BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Appeal of the Audit Involving:<br><br>DIANE TEN,<br><br>Appellant,<br><br>vs.<br><br>WESTSIDE REGIONAL CENTER,<br><br>Respondent. | OAH No. 2012110918 |

**PROPOSED DECISION**

This matter came on regularly for hearing on April 8, 2013, in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Diane Ten, (Appellant) was present and represented herself.[1]

Westside Regional Center (Respondent) was represented by its Director of Community Services, Mary Lou Weise-Stusser, M.A.

Oral and documentary evidence was received. The record was closed on the hearing date, and the matter was submitted for decision.

FACTUAL FINDINGS

1. Appellant is the mother of two sons who are clients of Respondent and who are receiving regional center supports and services. Appellant is an attorney practicing law in Encino.

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[1] During the morning session of the hearing, Appellant was assisted by her husband, Jeffrey Ten.

2. In or around August of 2004, Appellant attended a Parent Voucher Orientation Meeting offered by Respondent. The purpose of the meeting was to familiarize adult consumers and minor consumers' parents, who had an interest in participating in the parent voucher program, with the various requirements of the program. Part of the program included a Power Point presentation. Respite care and billing were among the topics covered by the Power Point presentation.

3. Among other things, the Power Point presentation regarding respite care included the following teaching points:

a. The Definition of In-Home Respite Services is "intermittent or regularly scheduled temporary non-medical care and supervision provided in the consumer's own home and designed to do all of the following: assist family members in maintaining the consumer at home; provide appropriate care and supervision to protect the consumer's safety in the absence of family members; relieve family members from the constantly demanding responsibility of caring for a consumer; and attend to the consumer's basic self-help needs and other activities of daily living, including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by the family member. (Exhibit 2, pages 14-15.)

b. As a vendor, the parent was considered the respite worker's employer. Therefore, the parent had to keep accurate payroll records. (Exhibit 2, page 17.)

c. Respite care had to be provided in the consumer's home. (Exhibit 2, page 19.)

d. Records the parent vendor was required to maintain included employee time cards to document actual service hours worked each day and daily start and end times, signed by the worker; payroll registers to document the worker's hourly rate, number of hours performed by the worker, wages paid to the worker, and payroll taxes withheld; and cancelled payroll checks, money orders, and cashier's checks issued to workers to document payments to the workers. (Exhibit 2, page 25.)

4. On August 3, 2004, Appellant received a packet containing information relating to vendorization for Parent Voucher/Specialized Supervision Respite. The packet contained a vendor application Form DS1890, a payment agreement, samples of the Provider of Claim Form and Attendance Form, Internal Revenue Service Publication 962--"Household Employer's Tax Guide," copies of California Code of Regulations, title 17 (Regulation), sections 50603, 50605, 50606, 54355, and 54310, examples of Internal Revenue Service Schedule H-Form 1040, Employment Development Department-Form DE6, Social Security Verification Form, an employee application, and a copy of the orientation presentation. Appellant signed the packet confirmation sheet under the sentence: "By [s]igning [b]elow you acknowledge your participation in this orientation and have received the Family Voucher Information Packet." (Exhibit 2, page 10.)

5. In numerous documents throughout the record, Appellant denied ever being informed that respite was to be provided only in the home. However, at the administrative hearing, Appellant testified only that she did not recall seeing the Power Point presentation. Appellant also raised the question of whether the Power Point slides that were printed on paper and admitted in evidence as part of Exhibit 2 were the same ones that were shown in the 2004 orientation. Ms. Weise-Stusser credibly testified that the Power Point demonstration was part of every Parent Voucher Orientation meeting, and that the printed slides included in Exhibit 2 were copied from the Power Point presentation contained in Respondent's 2004 archives. Given Appellant's limited recall and Respondent's regular custom and practice of including the Power Point presentation, Ms. Weise-Stusser's testimony was the more convincing. Further, Appellant's signature on the Parent Voucher Orientation Meeting Participation Packet and Confirmation establishes her receipt of the documents referenced on the confirmation, including but not limited to a copy of the orientation presentation.

6. On December 17, 2005, Appellant submitted to Respondent a "Vendor Application for In-Home Respite--Non-Medical." (Exhibit 2, page 7.) The form contained eight conditions to which the applicant was required to acknowledge understanding and/or agreement. Condition No. 1 read: "I agree to select, assign, monitor and pay competent individuals over age 18 to provide non-medical in-home respite or day care services for my family member who is a regional center client." The same form also contained check boxes for four types of services. The names of those services, and their internal code numbers, were listed next to their respective boxes. The service next to the third box reads: "In-Home Respite Service/Non-Medical – 420." That box is marked with a slash through it. (*Id.*). Appellant denies marking the box. However, she signed the documents over the statement "I hereby certify to the best of my knowledge and belief, this information is true, correct and complies with [California Code of Regulations,] Title 17, Section 54310 (a)(8)." At the hearing, Appellant testified that she usually reads documents before she signs them.

7. On the same date, December 17, 2005, Appellant signed a Home and Community Based Services Provider Agreement in which she was assigned Vendor Number VW 0533. The service code assigned to the agreement was 420. (Exhibit 2, page 8.) Therefore, given the information on the application and the agreement, Appellant knew or should have known that her vendor number VW 0533 was to be used for in-home respite services.

8. On July 11, 2006, Appellant signed another Home and Community Based Services Provider Agreement. That agreement was intended for day care and bore the correct internal code number 405.

9. On January 29, 2010, Appellant participated in an administrative hearing before the Office of Administrative Hearings. The issue in that hearing was a reduction of respite hours. The hearing did not involve vendorization requirements, and that issue was not addressed.

10. On December 16, 2010, Respondent wrote to Appellant to inform her that Respondent intended to conduct a billing/staffing audit for the period July 1, 2009 through June 30, 2010.

11. On May 25, 2011, Respondent issued its draft audit report. The report contained the following findings:

a. Appellant failed to maintain and provide a detailed timesheet for each consumer for services provided each month for the audit period (source document). Instead of using detailed timesheets as required, she had used a monthly billing form. This violated Regulation 50604, subdivision (e) which required source documentation.

b. In-home respite service hours had not been performed exclusively in the consumers' home.

c. In some months during the audit period, Appellant paid her workers more than the rate Respondent had approved. Overages were not reimbursable by Respondent.

d. Appellant was overpaid by $1,783.74 for respite services out of the home, and $45.05 in connection with ESY camp. Therefore, the auditor found that Appellant should reimburse Respondent the sum of $1,828.79.

12. Among other things, the auditor recommended that, because of her non-compliance with applicable regulations and the Vendor Application Agreement, Appellant should be placed on a Corrective Action Plan pending her full compliance.

13, On June 20, 2011, Appellant responded to the draft audit report. She did not dispute several of the auditor's findings, but she blamed regional center personnel for not informing her of her mistakes. She claimed she properly maintained records because Regulation 50604, subdivision (e) was not applicable since she was not operating a residential facility. She also claimed she had not charged Respondent for any additional sums she had paid to her workers. Lastly, she asserted that all services for which she had billed had been approved by her case worker, Marissa Barredo. For those reasons, Appellant argued that the $1,828.79 should not be reimbursed. However, she failed to explain why the sum should be waived solely because she had not been earlier informed that she was billing improperly.

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14. On June 29, 2011, Respondent issued its final audit report. The findings and recommendations were consistent with those in the draft audit report. Before issuing the report, Respondent had investigated Appellant's claim that her billings had been approved by her case worker. The auditor wrote: "Based on WRC's [Respondent's] review of the WRC Purchase of Service Request for In-Home Respite, the Purchase of Service Request did not indicate any names of the service provider or worker to provide service for In-Home Respite or [that] any service providers or workers was [*sic*] approved by Ms. Marissa Barredo. In addition, the billing forms submitted by the vendor for reimbursement did not indicate any approval from Ms. Marissa Barredo." (Exhibit 6, page 391.) In addition, according to the final audit report, although Regulation section 50604, subdivision (b) applies to residential facilities, section 50604 (d) requires all service providers (not only residential facilities) to maintain complete service records, and lists what records must be included. Further, section 40604, subdivision (e) requires all service providers (not only residential facilities) to support their records with source documentation. Appellant had failed to comply with either regulation.

15. Appellant timely filed a vendor appeal with the Department of Developmental Services (DDS). Respondent filed a timely response, and the matter was submitted to DDS for determination.

16. DDS issued its Letter of Findings on October 4, 2012. In that letter, DDS upheld all of the findings in the Final Audit Report, but reduced the amount of the over-payment from $1,828.79 to $1,817.24 due to incorrect calculations. DDS specifically found that: (1) The monthly billing forms Appellant had used to track time and payments to respite workers were not source documents because they were provided to the vendor in the third week of each service month. Therefore, they could not be used as a form that was completed at the time the service was provided. (Exhibit 9, p. 492.) (2) Appellant had been on notice that respite was to be only in the consumers' home by virtue of her attendance at the Parent Voucher Orientation and her receipt of the printed material. (3) Appellant had not charged Respondent for amounts paid to workers in excess of those authorized by Respondent. (4) The use of out-of-home respite providers and the lack of source documentation justified the auditor's recommendation that Appellant be placed on a Corrective Action Plan.

17. Throughout each of the steps of this process, the main issue in dispute has been Appellant's billing for out-of-home respite. In that regard, she has placed her sons in a number of outside settings including religious school, a program at the Beverly Hills Country Club, and camp. When she billed those services under her day care vendor number, Respondent viewed them as day care and reimbursed Appellant for them. However, they were properly disallowed when Respondent billed them under her respite vendor number.

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18. At the administrative hearing, Appellant testified that, before placing her sons in religious school, she asked her service coordinator if it was permissible to do so and to charge Respondent for it as respite, and that the service coordinator answered affirmatively. However, Appellant admitted that the conversation is not documented in any of the records, and that she chose not to subpoena the service coordinator in order to avoid the service coordinator being placed in an awkward position. Without any corroborating documentation or testimony, no weight can be assigned to Appellant's hearsay statement.

## LEGAL CONCLUSIONS

1. The standard of proof in this case is a preponderance of the evidence.

2. Pursuant to California Code of Regulations, title 17, section 50758, subdivision (k), Respondent bore the burden of proof to establish that the decision made in the audit was correct. Respondent sustained its burden. The burden of proof then shifted to Appellant to show the propriety of her position. Appellant failed to sustain that burden.

3. Cause exists to sustain the Final Audit Report pursuant to California Code of Regulations, title 17, sections 50602, subdivision (o), 50604, subdivision (d) and (e), 50606, subdivisions (a) and (b), 50705, 54326, subdivision (a), 54302, subdivision (a)(38), and 54355, subdivisions (a), (b), (d), (f), and (g), as set forth in findings 2 through 18.

4. Virtually all of Appellant's case can be summed up in one sentence she wrote in her vendor appeal to DDS: "It is our contention that we were not overpaid because I was never notified in writing that [r]espite could not be procured outside the home." (Exhibit 7, page 460.) First, there is no statute, rule or regulation that conditions reimbursement for over-payment on such a writing. On the contrary, the determination of over-payment and the need for reimbursement is one of the purposes of an audit. Secondly, Appellant was charged with the knowledge required to be a parent vendor. She attended the orientation. She received documentation from the orientation. She had access to the applicable regulations and, especially as an attorney, she knew how to read them. Respondent had no responsibility to do more than it did. In fact, not even the orientation was mandated. Respondent offered it voluntarily, as a service to assist its adult consumers and parents of minor consumers.

5. Appellant testified that she would have changed her billing practices sooner had she known they were wrong. This implies that she acknowledged that certain bills were improperly drafted. The fact that she found out later instead of sooner does not obviate her responsibilities to reimburse Respondent for over-payments.

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6. Appellant sought to avoid responsibility for her errors and over-payment by blaming others. She blamed regional center personnel for failing to inform her that respite meant in-home respite, even though she attended the orientation and signed documents containing that specification. She blamed regional center personnel for her errors by accusing them of failing to provide her with the necessary internal code numbers. Yet, those numbers appeared on documents she signed. She blamed her service coordinator for giving her incorrect information regarding which services could be billed as respite, and for failing to provide her with a letter proscribing billing for out-of-home respite. She even blamed regional center personnel for failing to address vendorization issues in her administrative hearing on January 29, 2010, when the issue in that case was the reduction of respite hours and had nothing to do with vendorization rules.

7. Equally troubling is Appellant's testimony concerning what she failed to receive from Respondent. She denied seeing the Power Point presentation. She denied receiving the printed Power Point presentation in the packet. She denied receiving a letter from her service coordinator instructing her that she could not bill for out-of-home respite. She denied receiving a letter in 2009 relating to the trailer bill. It is difficult to understand how or why Respondent could fail to provide so many important documents to Appellant, yet still claim the documents were provided and, in some cases, provide proof that they had been provided to Appellant. The weight of the evidence requires consideration of the strong possibility that the problem, at least in part, was on the receiving end rather than on the sending end.

8. On several occasions during the administrative hearing, Appellant raised the question of whether the language of the applicable regulations had changed since 2004. However, she offered no evidence to show any such change, and the histories of those regulations do not reflect any substantive changes to the language.

9. Respondent argued that, because her service coordinator told her that she could bill religious school as respite, Respondent should be estopped from recovering the over-payment. That argument was not persuasive. First, because the service coordinator's purported statement was uncorroborated by her testimony or documentary evidence, no weight could be assigned to Appellant's claim. Secondly, even if the statement was true, it does not account for the other out-of-home respite for which Appellant billed, such as the Beverly Hills Country Club program and camp.

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10. Further, the facts of this matter do not satisfy the elements of equitable estoppel.

> Equitable estoppel arises from the declarations or conduct of the party estopped and has five elements: "(a) a representation or concealment of material facts (b) made with knowledge, actual or virtual, of the facts (c) to a party ignorant, actually and permissibly, of the truth (d) with the intention, actual or virtual, that the latter act upon it; and (e) the party must have been induced to act upon it." (Citations.) (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 348.)

11. First, assuming the statement was actually made, there is no evidence that the service coordinator had actual or constructive knowledge that it was not true. Secondly, Appellant was not ignorant of the truth. She had attended the orientation and received the documentation that contained the true facts. If she still did not know the true facts, her ignorance was not permissible as required to trigger the doctrine of equitable estoppel.

12. In summary, Appellant argues that she should be excused from reimbursing Respondent for the over-payment because Respondent did not inform her of the information she needed to comply with the law, and therefore, Appellant was ignorant of the law she was required to follow. However, it was Appellant who was responsible for knowing her legal obligations, whether or not Respondent rendered assistance in that area. To hold otherwise would reward Appellant for the ignorance she was responsible for abating, and it would impose strict liability on Respondent for another's ignorance. The law neither requires nor condones such a result.

## ORDER

1. Except for the amount of reimbursement, the Final Audit Report of June 20, 2011, for Vendor Nos. VW 2402 and VS 0533, for the inclusive dates of July 1, 2009 through June 30, 2010, is sustained.

2. Appellant shall reimburse the Westside Regional Center the sum of $1,817.24, in a manner consistent with California Code of Regulations, title 17, section 50705.

3. Respondent shall place Appellant in a Corrective Action Plan forthwith.

Dated: April 12, 2013

_____/s/_____
H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings